REMARKS/ARGUMENTS

The Office Action dated January 31, 2005 includes a double patenting rejection regarding claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 52, 53, 57-63 and 66-73. It also identifies claims 3-5, 13, 14, 23-26, 29-31, 39, 40, 49-51, 54-56, 64 and 65 as being allowable subject matter if rewritten in independent form to include all of the limitations of the base claim and any intervening claims. Regarding the double patenting rejection, the Examiner specifically states:

> *Claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 52, 53, 57-63 and 66-73 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2-9 and 11-18 of copending Application No. 10/206,131. Although the conflicting claims are not identical, they are not patentably distinct from each other because present claim 1 is merely a broader version of the subject matter covered by claims 11-18 presented in the '131 application (the use of the ubiquitous accelerometer to sense motion or mechanical contractions is old and well-known by those of ordinary skill in the art and therefore would have been considered a blatantly obvious design expediency - in any event, accelerometer use is referred to in claim 15 of the '131 application). Likewise, claims 27 and 52 of the present application are merely a broader version of the subject matter covered by claims 2-9, presented in the '131 application. Assuming the '131 invention receives a patent, the applicant would not be entitled to receive a patent for generic or broader invention (In re Goodman, 11F. 3d 1046, 29 USPQ 2d 2010 (Fed. Cir. 1993)).*
>
> *Regarding claims with limitations of the type found in claims 11 and 12, those of ordinary skill in the art would have seen the particular landmark or fiducial points from which to base phase difference measurement to be a matter of obvious design. Clearly any recurrent feature of the waveform signifying a contraction such as the onset of contraction or the peak of contraction signal could have been used as long as the point selection was consistently applied from one accelerometer output to the other.*
>
> *Regarding claim 15 and claims with similar limitations, the examiner considers it inherent that the accelerometer continuously senses motion during consecutive cardiac cycles by virtue of the fact that the piezoelectric material will by its physical nature produce an electrical signal indicative of motion any time the heart contracts.*
>
> *This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.*

In response to the Examiner's rejection of Claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 52, 53, 57-63 and 66-73 as being unpatentable over claims 2-9 and 11-18 of copending Application Serial No. 10/206,131, Applicant respectfully traverses the rejection. MPEP §706.02(k) states:

> *Where two applications of different inventive entities are copending, not published under 35 U.S.C. 122(b), and the filing dates differ, a provisional rejection under 35 U.S.C. 102(e)/103* ***should be made in the later filed application*** *if the applications have a common assignee or a common inventor, unless the later application was filed on or after November 29, 1999 and the applications were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made.*

Emphasis added. MPEP §706.02(k) further states that:

> *[p]rovisional rejections of the obviousness type under 35 U.S.C. 102(e)/103 are rejections applied to copending applications having different effective filing dates wherein each application has a common assignee or a common inventor.* ***The earlier filed application, if patented >or published<, would constitute prior art under 35 U.S.C. 102(e).***

Emphasis added.

Applicant respectfully submits that the present application Serial No. 10/005,092 has a filing date of December 5, 2001. The copending application, Serial No. 10/206,131, cited by the Examiner in support of the obviousness type double patenting rejection has a filing date of July 26, 2002, over seven months after the filing date of the present application. Pursuant to the MPEP §706.02(k) the Examiner is incorrect in applying application Serial No. 10/206,131 as prior art to the present application because the present application is the earlier filed copending application. Because the present application has the earliest filing date, copending Application Serial No. 10/206,131 would not constitute prior art under 35 U.S.C. §102(e) because it has a filing date that is more than seven months after the filing date of the present application. Accordingly, in view MPEP §706.02(k) and the respective filing dates of the present application and that of application Serial No. 10/206,131, Applicant respectfully requests reconsideration of the double patenting rejection of claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 52, 53, 57-63 and 66-73 and respectfully submits that claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 52, 53, 57-63 and 66-73 are allowable. Applicant further requests reconsideration of the rejection of claims 3-5, 13, 14, 23-26, 29-31, 39, 40, 49-51, 54-56, 64 and 65 in view of the Examiner's statement that these claims are allowable

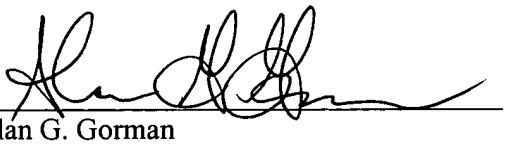
subject matter, in view of the dependency of these claims on claims which Applicant submits are allowable in view of the above submitted remarks. Accordingly, Applicant respectfully submits that claims 1-76 are in condition for allowance, and notification of that effect is earnestly solicited.

CONCLUSION

Should the Examiner have any questions or comments, please contact the undersigned at 404-954-5033.

Respectfully submitted,

MERCHANT & GOULD, LLC



Date: March 31, 2005

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